

BEFORE THE
SURFACE TRANSPORTATION BOARD



Ex Parte No. 582
(Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES
Notice of Proposed Rulemaking by the Surface
Transportation Board to Modify its Regulations
at 49 CFR part 1180 Governing Proposals for
Major Rail Consolidations

COMMENTS OF CONSUMERS
UNITED FOR RAIL EQUITY

Robert G. Szabo
J. Curtis Rich
Van Ness Feldman
1050 Thomas Jefferson N.W.
6th Floor
Washington, DC 20007
202-298-1800

Counsel for Consumers United For Rail Equity

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I Introduction

Pursuant to the Surface Transportation Board's (STB) October 3, 2000 issuance of proposed rules, Consumers United for Rail Equity (CURE), submits comments concerning proposed modifications to the STB's Railroad Consolidation Procedures.^{1/}

CURE is a coalition of rail shippers, including public power generators, rural electric cooperatives, investor owned electric utilities, coal producers, chemical and petrochemical companies, that rely on rail transportation but are sometimes "captive" to a single railroad for at least some of their rail movements. CURE advocates federal policies that will promote competition and increase efficiencies in the rail industry.^{2/}

^{1/} 49 C.F.R. §§ 1180.0 --1180.9.

^{2/} CURE's membership includes the following: Algona Municipal Utilities; American Electric Power Service Corporation; American Public Power Association; Arizona Electric Power Cooperative; Arkansas Electric

Since these proceedings commenced with the STB's March, 2000 hearings on rail competition, CURE has advocated that the STB change specific current policies that inhibit effective competition in the rail industry and adopt new, pro-competitive rules applicable to all major railroads. The proposed rules published by the STB on October 3, 2000 do not follow this recommended course of action and are, therefore, flawed in two fundamental respects.

First, while the proposed rules recognize that the STB's current rules respecting "bottleneck" pricing, terminal and interchange access, and "paper barriers", inhibit competition, and the record of the Board's March, 2000 hearings is replete with the concerns of rail customers and non-major railroads regarding these three matters, the STB has recommended that new pro-competitive interpretations of these issues need only apply to merging railroads rather than to the industry as a whole. Second, the proposed rules give the STB absolute discretion concerning whether to apply pro-competitive conditions to merging railroads, rather than establish a clearly enunciated policy where certain pro-competitive standards must be met as a condition to merger.

• CURE believes that these two concerns are reflective of the complaints made repeatedly by rail customers to the STB and Congress. We ask that you make the necessary changes to the proposed rules in order that the final rules have a demonstrable impact on the fundamental problem facing the rail industry today – a regulatory framework that encourages monopolistic behavior.

Cooperative Association; Buckeye Power, Inc; Camelot Coal Company; Carolina Power and Light Company; Consumers Energy Company; Dairyland Power Cooperative; Duke Energy Corporation; Edison Electric Institute; Empire District Electric Company; Entergy Services, Inc.; Ethyl Corporation; Kansas City Power and Light Company; Minnesota Power; Municipal Electric Systems of Oklahoma; National Rural Electric Cooperative Association; Nebraska Public Power District; The Ohio Valley Coal Company; Potomac Electric Power Company; Shawnee Coal Company; and Sunoco, Inc.

II CURE Has Consistently Called for Reasonable Rule Changes That Will Promote Effective Rail Competition Both in Major Rail Merger Proceedings and as General National Rail Policy.

CURE agrees with the STB that the rapid consolidation of the major railroads in North America warrants a "paradigm shift" in the way in which the STB reviews major railroad mergers. CURE believes, however, that the STB must reach beyond the merger context and develop pro-competitive rules that apply to the industry as a whole, whether or not future mergers are approved. A more expansive approach is necessary to address effectively the concerns repeatedly raised by rail shippers, to promote a more robust, competitive rail industry, and to meet the principal goals of the Staggers Rail Act. CURE believes the following changes to current STB policy are warranted:

- A. The STB should adopt stronger merger review guidelines that evaluate each merger's impact on competition and that apply the following requirements as a precondition to future mergers or consolidations between major railroads:
 - A demonstration that an increase in competitive options will be available to shippers following a merger;
 - A requirement that no merger will be approved that reduces transportation alternatives available to current railroad customers, including an analysis beyond any "bottleneck" affecting a rail shipper;
 - A requirement that no merger will be approved that fails to provide additional options and enhanced service for railroad customers;
- B. The STB should reverse its current policy regarding "bottlenecks" and adopt a new policy requiring railroads to quote a rate between any two points on its system where traffic can

originate or be interchanged;

- C. The STB should affirmatively grant the right of Class I and small railroads to interchange at terminal areas and interchange points without being disadvantaged in any way in terms of operations or pricing; and
- D. The STB should eliminate all "paper barriers" that arbitrarily restrict full interchange rights for Class II and III railroads.

In its comments throughout this proceeding, CURE has requested that these changes to STB policy be adopted as a condition to any future rail merger in which the application is filed after January, 2000. CURE requested that these changes apply as general regulatory policy for all major railroads. Finally, since the proposed rules issued under Ex Parte No. 582 are limited in scope to merger rules, CURE again requests that the STB act on the voluminous record established in this proceeding by rail customers, short line and regional railroads, the United States Department of Transportation (USDOT) and the United States Department of Agriculture (USDA), to address issues that have broader application than just merger proceedings,^{3/} and are critical to the promotion of effective rail competition.

III In Order to Meet its Public Interest Obligation, the STB Must Amend its Proposed Merger Rules and Apply New, Pro-Competitive Requirements to the Entire Rail Industry.

As the STB's proposed rule § 1180.1 (b) reaffirms, the STB has a duty to act in the public interest when considering rail mergers. This duty expands beyond the merger context, however, and obligates the STB to carry out the public interest in its role as the regulator of the rail

^{3/} 49 C.F.R. § 1110.2.

industry.^{4/} The Board clearly appreciates that the rail consolidations of the last decade have wrought tremendous changes on this nation's major rail industry. The latest round of proposed mergers highlights the problems that currently pervade the industry and are likely to be exacerbated by any further industry consolidation. As the STB indicates, during its March, 2000 hearings on consolidation of the rail industry, a broad cross-section of shippers from across the country presented oral and written testimony that expressed "overwhelming opposition to simply carrying on with business as usual."^{5/} CURE believes that this sentiment expressed by shippers goes beyond the STB's merger policy and extends to current STB policies that impede real competition in the industry.

In its proposed rule, the STB recognizes that there are currently regulatory impediments to enhanced competition and proposes a change to these policies as a deterrent to future mergers that will otherwise reduce competition. For example, the rules propose requiring applications to "explain how they would at a minimum preserve competitive options such as those involving the use of major existing gateways, build-outs or build-ins, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement."^{6/} The STB also proposes imposing conditions on merging railroads that include "requiring the granting of trackage rights and access to other facilities."^{7/}

CURE fails to understand why these pro-competitive policies are appropriate to a merged

^{4/} Under the Staggers Rail Act of 1980, the STB has the responsibility to carry out a national rail policy that, among other things, allows, to the maximum extent possible, competition; minimizes the need for Federal regulatory control over the rail transportation system; expedites regulatory decisions when regulation is needed; and ensures the development of effective competition. 49 U.S.C. § 10101.

^{5/} Respondent's Brief, *Western Coal Traffic League v. Surface Transportation and United States of America*, No. 00-1115 (D.C. Cir., filed May, 2000).

^{6/} Proposed §1180.1(c)(2).

^{7/} Proposed §1180(d).

industry consisting, perhaps, of as few as two transcontinental railroads, but are not appropriate to the current industry structure of five remaining large railroads -- two in the West, two in the East and one in the center of the nation.^{8/} The rationale that leads the STB to conclude that bottleneck relief and terminal access are justifiable policy positions in the merger context should also lead the STB to conclude that these policies should apply to the industry as currently configured. Therefore, CURE asks that the STB expand the scope of this rulemaking to extend beyond a narrow change of merger review standards to adopt new policies with respect to bottlenecks, terminal and interchange access and paper barriers that promote competition for all railroads.

IV The Discretionary Application of the Proposed Rules Falls Short of Ensuring that the Public Interest will be Protected Adequately in Future Mergers. The STB Must Amend its Rules to Establish Mandatory Pro-Competitive Provisions that Apply to all Merging Railroads.

In its proposed rules, the STB vests in itself the discretion to condition future mergers on the willingness of the merging railroads to institute certain pro-competitive policies. Under the new rules, the STB's guiding principle for evaluating mergers is to ensure that the transaction "will promote a competitive, efficient, and reliable national rail system."^{9/} CURE agrees with the STB that the public interest is best served by upgrading the importance of competition in the process of evaluating mergers.

Under these rules, the STB relies on its own discretion as the primary mechanism by which it will ensure that future major rail mergers are sufficiently pro-competitive. For example, the proposed rules require merging railroads to develop a plan for enhancing competition. The

^{8/} The two large Western railroads are the Burlington Northern and Santa Fe Railway Company (BNSF) and Union Pacific Railroad Company (UP). The two large Eastern railroads are CSX Transportation, Inc. (CSX) and Norfolk Southern Railway Company (NS). The large system in the center of the nation is the Canadian National Illinois Central rail system (CNIC).

^{9/} Proposed § 1180.1(b)

STB indicates in its explanatory notes to the proposed rules that these plans for enhancing competition could include an agreement to grant trackage rights, establish shared or joint access, remove paper and steel barriers, and "other techniques that would preserve and enhance railroad competition."^{10/}

Additionally, the proposed rules require merger applicants to "explain how the transaction and conditions they propose will enhance competition."^{11/} The STB indicates it will require applicants to "present an effective plan to keep open major existing gateways, and to preserve opportunities for separately challengeable segment rates to be used in conjunction with contract rates in bottleneck situations."^{12/} Finally, the proposed rules require merger applicants to propose conditions that will enhance competition.^{13/}

While CURE agrees that the future mergers need to be evaluated and approved based on a result of enhanced competition, we disagree with the complete reliance in the proposed rule on the STB's discretion in determining whether a merging company's plan for enhancing competition meets this threshold. The proposed rule should be changed in order that merging railroads have the absolute obligation to adhere to policies that promote rail competition. These final rules should include the following:

- a requirement that merging railroads quote a rate between any two points on its system where traffic can originate or be interchanged;
- a requirement that merging railroads allow other rail carriers to interchange at

^{10/} STB's Notice of Proposed Rulemaking (October 3, 2000) at page 13.

^{11/} Proposed §1180.1(c)(1).

^{12/} STB's Notice of Proposed Rulemaking (October 3, 2000) at page 15.

^{13/} Proposed § 1180.1(d).

terminal areas and interchange points without being disadvantaged in any way in terms of operations or pricing;

- a requirement that merging railroads to take actions that eliminate all paper and steel barriers that arbitrarily restrict full interchange rights for Class II and III railroads.

The conditions that the STB would have the discretion to impose on merging railroads under the proposed rule must be both strengthened and made an absolute condition to future mergers.

V Conclusion

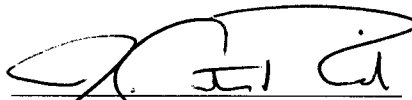
CURE strongly agrees with the STB's fundamental premise that future rail mergers must be measured against a pro-competitive standard. Merger rules that are unequivocal in their demand that future rail mergers result in enhanced competition are critical to the future health of the rail industry and many aspects of our economy. Unfortunately, in an era that already has seen the dramatic consolidation of the rail industry to a very few carriers that wield incredible market power, the Board's proposed rules on mergers are simply inadequate.

CURE asks that the STB make effective competition the centerpiece of this Nation's rail policy. Merger policy focused on enhancing competition, rules that allow competitive rail opportunities to develop for captive shippers, and actions that create healthy regional railroads throughout the U.S. are all necessary components to a rational, forward looking national rail policy. Where the STB has the statutory authority to bring about these changes, it must act. Where the STB believes it lacks the authority to act, it must give Congress a clear signal in order that Congress may take the steps necessary to pass legislation that results in a comprehensive rail policy that keeps railroads healthy and provides transportation competition for shippers.

Respectfully Submitted,



Mr. Robert G. Szabo
Executive Director and Counsel
Consumers United for Rail Equity
Van Ness Feldman, P.C.
1050 Thomas Jefferson Street, NW
Washington, D.C. 20007
(202) 298-1920



Mr. J. Curtis Rich
Counsel
Consumers United for Rail Equity
Van Ness Feldman, P.C.
1050 Thomas Jefferson Street, NW
Washington, D.C. 2000
(202) 298-1886

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